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91-2018

NO.

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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DONALD J. BANKS,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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DONALD J. BANKS
Petitioner (Pro se)
P.O. Box 2286
Stillwater, OK 74076
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## QUESTION PRESENTED

Is an individual's right to equal protection under the Fourteenth Amendment to the Constitution of the United States violated when officials of a Federal Agency purposely: 1) hold secret the specific "critical elements" of a contested employment position even though the elements are required by law to be written on the official performance plan for the subject position, and, according to regulations, are required for assessing the individual's placement rights and 2) uses the secret as a tactic for denying the individual the position?.

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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1991

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DONALD J. BANKS, Petitioner,

vs.

DEPARTMENT OF AGRICULTURE, Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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Petitioner, Donald J. Banks (pro se), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The judgement, the order denying the petition for rehearing, and the order declining the suggestion for rehearing in banc of the Court of Appeals for the

Federal Circuit appear in Appendix parts A, B, and C to this Petition, respectively. The Final Order and the Initial Decision of the United States Merit Systems Protection Board (MSPB) appear in Appendix parts D and E to this Petition, respectively.

## JURISDICTION

The Judgment of the Court of Appeals in this matter was filed on February 7, 1992. A timely Combined Petition for Rehearing and Suggestion for Rehearing In Banc was filed on February 18, 1992. The Court of Appeals denial of the Petition for Rehearing was issued on March 3, 1992 and the declination of the suggestion for rehearing in banc was issued on March 13, 1992. This Court's jurisdiction is invoked under 5 U.S.C. § 7703(b)(1).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The MSPB had jurisdiction pursuant to 5 C.F.R. § 1201.3 (1990).

On October 18, 1990 the Petitioner (Appellant) timely appealed to the MSPB the conduct of a reduction in force (RIF) by the Agency which had resulted in the Petitioner's involuntary retirement on September 29, 1990. Cited in the appeal were allegations of reprisal [a prohibited practice - under 5 U.S.C. § 2302(b)(9)] against the Petitioner for the exercise of

an earlier grievance appeal on the part of an Agency Official (Dr. Horn) who had overruled the opinions of personnel classification specialists that the Petitioner had "bumping rights" over a lower ranking employee during the RIF. A hearing was held on January 10, 1991 before an Administrative Judge (AJ) of the MSPB in Oklahoma City. An Initial Decision (ID) was issued on February 20, 1991 which affirmed the Agency's RIF actions. In regard to bumping rights, the AJ determined that the Petitioner could not

> "perform in the contested position as it was established without undue interruption".

On March 27, 1991 the Petitioner timely filed a Petition for Review with the MSPB citing new evidence and erroneous interpretation of statutes and regulations on the part of the AJ as reasons for reversal, again inferring reprisal as a

primary motivating force in the RIF. On August 2, 1991, the MSPB denied the Petition for Review, wherein the ID became final.

On October 29, 1991, the Petitioner (pro se) appealed the MSPB ruling to the United States Court of Appeals for the Federal Circuit, again, declaring reprisal on the Agency's part as a motive for the involuntary retirement action, and citing misapplication of rules and procedures in the AJ's determination. On February 7, 1992, the Court of Appeals affirmed the MSPB decision upholding the Agency's action.

On February 18, 1992 the Petitioner filed a combined Petition for Rehearing and Suggestion for Rehearing In Banc with the Court of Appeals. The Petition and Suggestion were denied and declined, without comment, on March 3 and March 13, 1992, respectively.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted. The ID of the AJ of the MSPB, affirming the Agency's action in denying the Petitioner the position of a lower ranking individual, was based solely on the "undue interruption" provision of the Office of Personnel Management (OPM) regulations. The AJ ruled that the Petitioner had met the selective criteria for the contested position and, therefore, met the requirements for assignment under 5 C.F.R. § 351.702(a)(1) (1990) (see ID at 15). The OPM regulation (5 C.F.R. § 351.702(4) states that an employee is qualified for assignment under § 351.701 (assignment rights, bump and retreat), if he

> "Clearly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical elements of the specific position upon entry to it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the

orientation of any new but fully qualified employee".

Furthermore, OPM clarified the degree of interruption allowable in FPM Supplement 351-1, Subchapter 2-1(v) by stating that

> "undue interruption means a degree of interruption that would prevent the completion of required work within the allowable time limits and quality, taking into account the pressure of priorities, deadlines, and other demands. A work program would be unduly interrupted if an employee needed more than 90 days after the reduction in force to successfully perform the critical elements of the position".

Of paramount importance are the specific references in both of the above citations to "critical elements". The words, themselves, imply significance. To avoid confusion, OPM has defined the words thusly:

> "Critical element means a component of a position consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that unacceptable performance of the element would

> result in unacceptable performance in the position".

See 5 C.F.R. § 430.203.

Congressional intent demands that OPM be responsible for prescribing federal employee performance management and appraisal systems. By law, OPM regulations require

> "establishing, in writing, the critical elements of each employee's position and the performance standards for the fully successful level for each such element which will, to the maximum extent feasible, permit accurate evaluation of job performance on the basis of objective criteria related to the job in question".

See 5 U.S.C. § 4302a(b)(2). It should be pointed out that in the Agency, the performance standards and the official position description are separate documents.

The importance of critical elements in assignment rights during RIF was addressed by the MSPB. In Reduction in Force - The Evolving Ground Rules, a report to the President and the Congress,

1987 the MSPB compared the 1986 OPM regulations with the 1983 Code and noted (among other things) that the new regulations

> "Require, for the first time, recognition of critical elements from performance plans[7], to decide competitive levels and job placement rights".

Job placement rights includes bumping rights. Footnote [7] reads:

> "A performance plan is the aggregation of all of an employee's written performance elements and standards".

However, contrary to the MSPB report, the AJ erred in making a determination relative to the undue interruption provision without the benefit of an evaluation of the critical elements, as written in the performance plan . Because job placement rights and critical elements were integral factors in the RIF, the performance plan of the contested position would be required to be included in the Agency response. See 5 C.F.R. §

1201.25(c). However, the Agency never admitted the content of the critical elements into evidence. Obviously, the AJ could not have considered them in making the determination presented in the ID.

The Court of Appeals, in affirming the MSPB determination, without comment, failed to recognize the importance of the critical elements in resolving the issue. Why the Agency failed to bring forth the critical elements of the contested position is unknown to the Petitioner. But their absence from the record is open to suspicion. The record shows that the Petitioner tried to secure the information from the Agency but was denied the information. This fact was presented in the Petition for Review to the MSPB. If a performance plan comprising the critical elements for the contested position had not been established, then the Agency violated law and ignored OPM regulations.

Conversely, a strategy of withholding the true identity of the critical elements effectively prevented their close scrutiny and helped make exaggerated testimony by Agency witnesses relative to perceived job duties more believable by the AJ. However, regardless of the reason used, an analysis of the critical elements was impossible and the regulation allowing the undue interruption provision was improperly applied. Consequently, the strategy employed by the Agency to eliminate the Petitioner from further federal service succeeded. The Court should recognize that the Agency tactic was damaging to the Petitioner and is analogous to arresting an individual for breaking an imaginary, unwritten law. Such a tactic would not succeed under criminal law!

Equally destructive to the Petitioner's appeal was the testimony of

Agency witnesses who grossly exaggerated the need for modern molecular biology methodologies as a job requirement and the amount of training needed in this area. The strategy to emphasize molecular techniques seems ironic because the paragraph dealing with research objectives and methodology in the official position description makes no mention of these techniques as requirements. In the Petition for Review to the MSPB, the Petitioner introduced new evidence proving that training time to learn recent molecular techniques (even if not required but advantageous to the project) could be learned in two weeks rather than 1 1/2 to 2 years, as inferred by Agency witnesses. More recent evidence, presented in the Agency's newsletter, Biotechnology Notes 5(4): p.4 USDA,CBA,OAB, April, 1992, states:

> "One to three-day classes in molecular biology techniques are

> available throughout the year at university labs around the country".

Recent evidence in the ARS Publication, Agricultural Research (Feb 92, p. 21) contrasts vividly with the opinion of the AJ (ID at 16) that the contested position

> "calls for the integration of modern biotechnology into the conventional breeding program".

The evidence in the article shows that the present incumbent (Dr. Porter) of the position the Petitioner was denied is exploiting results derived from some of the specific techniques proposed by the Petitioner. Ironically, the x-ray technique in which the Petitioner has notable expertise -- established at the hearing -- was declared by Agency witnesses to be old and ineffective. The article quotes Porter as stating:

> "Our discovery of germplasm with multibiotype resistance should simplify efforts to develop new cultivars".

Furthermore, the article states:

> "Greenbug resistance in the new lines is believed to have come from a rye chromosome in a wheat/rye hybrid that Sebesta treated with x-rays before making a series of further crosses with wheat".

It should be pointed out that references to molecular biology approaches are conspicuously absent in the article which describes the present incumbent's work. The Court (and the MSPB) should sense that Agency witnesses intentionally mislead the AJ at the hearing. The complete record needs to be reexamined in light of these important pieces of evidence which contradict Agency testimony upon which the AJ based a decision denying the Petitioner a rightful position.

It should be clear that the Petitioner has suffered a great injustice at the hands of the Agency. Even more discouraging is the belief by the Petitioner that neither the MSPB nor the Court of Appeals appear to have recognized the importance of valid documented truths

when compared to undocumented Agency testimony. Examination of the law and regulations, when properly construed and viewed in the context of RIF actions, assignment rights, official position descriptions, performance plans, and employee qualifications will show that the Petitioner should have been placed in the job that he was denied. Thus, the reason for this Petition for a Writ of Certiorari.

This Court should grant certiorari here to explicitly rule that "Critical Elements", as intended by Congress, the laws, and OPM regulations, have real meaning in determining job placement rights during reductions in force practiced by federal agencies. Apparently this Court has never addressed the issue of RIF in the Federal workforce. This case is important in establishing the RIF rights of Federal employees and has

application to all public servants. U. S. Government agencies employ more than 2.5 million full-time permanent employees. It is important that the RIF ground rules be precisely defined and that the laws and regulations encompassing them be upheld by the courts. As agencies try to cope with declining budgets by invoking additional RIFs the number of appeals will increase at alarming rates. A better understanding of the High Court's view by all will result in a reduction in the number of appealable cases and thus, help reduce the various courts' increasing workload.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter*.

Respectfully submitted,

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DONALD J. BANKS
Petitioner (Pro se)

May 28, 1992

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* If this Court elects not to address the issues presented in the writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for the Federal Circuit for redetermination in light of 5 U.S.C. § 4302a(b)(2) (1988), Congressional intent, and the new evidence presented here.

# APPENDIX

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**APPENDIX A**

DONALD J. BANKS

v.

DEPARTMENT OF AGRICULTURE

No. 91-3563

U. S. Court of Appeals for the Federal Circuit

February 7, 1992

**JUDGEMENT**

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD in CASE NO(S). DA03519110053 This CAUSE having been considered, it is ORDERED AND ADJUDGED:

Per Curiam (NIES, Chief Judge, MAYER AND PLAGER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/S/ _____
Francis X. Gindhart, Clerk

**APPENDIX B**

DONALD J. BANKS

v.

DEPARTMENT OF AGRICULTURE

No. 91-3563

U. S. Court of Appeals for the Federal Circuit

March 3, 1992

**ORDER**

Before NIES, Chief Judge, MAYER, Circuit Judge, PLAGER, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on March 10, 1992.

FOR THE COURT,

/S/_____
Francis X. Gindhart
Clerk

**APPENDIX C**

DONALD J. BANKS

v.

DEPARTMENT OF AGRICULTURE

No. 91-3563

U. S. Court of Appeals for the Federal Circuit

March 13, 1992

**ORDER**

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/S/_____
Francis X. Gindhart
Clerk

**APPENDIX D**

DONALD J. BANKS

v.

DEPARTMENT OF AGRICULTURE

No. DA03519110053

U. S. Merit Systems Protection Board

August 2, 1991

BEFORE Daniel R. Levinson, Chairman

Antonio C. Amador, Vice Chairman

Jessica L. Parks, Member

**ORDER**

After full consideration, we DENY the appellant's petition for review of the initial decision issued on February 20, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. §1201.113(b). FOR THE BOARD:

/S/ _____
Robert E. Taylor
Clerk of the Board

**APPENDIX E**

DONALD J. BANKS

v.

DEPARTMENT OF AGRICULTURE

No. DA03519110053

U. S. Merit Systems Protection Board

February 20. 1991

Frank E. Walta, Esquire, Oklahoma City, Oklahoma, for the appellant.

John Burns, Greenbelt, Maryland, for the agency.

BEFORE

Sharon Fonsworth Jackson
Administrative Judge

**INITIAL DECISION**

Donald J. Banks appealed the reduction-in-force (RIF) action taken by the Department of Agriculture (USDA), Agricultural Research Service (ARS), which resulted in his involuntary separation from the position of Research Geneticist (Plants), GM-0440-13, effective September 29, 1990. The Board has jurisdiction over

the appeal pursuant to the provisions of 5 C.F.R. § 351-901 (1990). See 5 C.F.R. § 1201.3(d) (1990).

Based on the following analysis and findings, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

It is undisputed that one of the primary functions of the appellant's position at the ARS in Stillwater, Oklahoma involved peanut germplasm curator activities. The record reflects that, by notice dated August 20, 1990, the agency advised the appellant that, because the peanut germplasm curator activities were being consolidated at its facility in Griffin, Georgia, it was necessary to conduct a reduction in force. See Appeal File, Vol. II, Tab 8(4z). The notice further advised the appellant that his position had been identified for abolishment; that he would be released from his competitive level; that, in

satisfaction of his assignment rights, he was being offered the position of Geneticist (Plants), GS-0440-09, in lieu of separation; and that, if he declined the assignment offer, he would be separated. The notice was amended on August 28, 1990, to extend the effective date of the RIF from October 5, 1990, to October 19, 1990, and again on September 21, 1990, to further extend the effective date of the RIF to November 30, 1990. See Appeal File, Vol. II, Tabs 8(4cc), 8(4jj). Rather than accept the lower-graded position offered by the agency, the appellant elected to retire from his position.

The agency's action will be sustained only if it is supported by a preponderance of the evidence. See 5 U.S.C. § 7701(c)(1). A preponderance of the evidence is that degree of relevant evidence that a reasonable person,

considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2) (1990).

The RIF regulations were properly invoked by the agency.

When an employee is affected by the agency's implementation of RIF regulations, the agency must show that the RIF regulations were properly invoked due to management considerations of the character appropriately committed to agency discretion[1] and that the agency properly

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[1] An agency may invoke RIF regulations for the following reasons: lack of work; shortage of funds, insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or the reclassification of an employee's position due to erosion of duties. (1990). See 5 C.F.R. § 351.201(a) (2) (1990).

applied the regulations to the appellant. See Decker v. Department of Health and Human Services, 40 M.S.P.R. 119, 123 (1989); Losure v. Interstate Commerce Commission, 2 M.S.P.R. 195, 201-02 (1980). If the agency establishes a prima facie case by demonstrating that the RIF regulations were properly invoked, the burden shifts to the appellant to come forward with evidence to rebut the agency's claim of a legitimate management reason for the RIF action. Decker at 127.

Dr. Philip A. Miller, a national program leader for ARS,[2] testified that,

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[2] Miller is a member of the ARS national program staff. The national program staff is responsible for identifying the kinds of research that should be conducted by ARS; assigning priority to different types of research in the agency; and/or recommending the funding that should be associated with the different kinds of research. Hearing Transcript (H.T.) 6. Specifically, Miller's role is to provide this type of information in connection with fiber crops, oil seed crops, and tobacco. H.T. 7

approximately one and a half years ago, the ARS Administrator asked the national program staff to establish a priority ranking of the different research projects funded by ARS based on the contributions of each project to the well-being of U.S. agricultural or food security. H.T. 9-10. Miller explained that some ARS projects had been operating over budget primarily because the funding for agricultural research had been constant for several years, with few significant increases, while costs for research during that time had increased. H.T. 8-9. He stated that the directors of the ARS area offices were also asked to prioritize the projects in their particular areas. In February 1990, the two groups met, at the Administrator's request, to compare lists and to identify 20 percent of the projects that were of lower priority. H.T. 10-11. He testified that, as a result of that meeting, a "pre-decision working document" was prepared

which evaluated the impact that the termination of the lower priority projects would have on the organization, as well as other institutions which used its services. Following further study of this document, a "project adjustment report" was prepared for the ARS Operations Committee's use in making a final decision on whether a project or group of projects would be terminated. See H.T. 11.

Miller testified that the peanut projects at Stillwater, Oklahoma were identified for termination and he provided the following rationale for the termination of the appellant's CRIS[3] project: The ARS is responsible for the national plant germplasm system.[4] Several

[3] Research projects are commonly referred to as CRIS projects. See H.T. 8. CRIS is an acronym for current research information service. Id.

[4] This system collects plant germplasm from different countries and preserves, maintains, evaluates and distributes it to researchers for a variety of research Projects. H.T. 12.

crop advisory committees have been established to advise ARS as to what their "priority needs" are and how the different types of germplasm should be used. In July 1985, the chairman of the Peanut Crop Advisory Committee recommended to ARS that funding be secured to employ a full-time curator for peanut germplasm and that all Peanut germplasm be consolidated at Griffin, Georgia under the direction of the curator. See H.T. 13; Agency Exh. 1. A similar recommendation was made by Dr. D.P. Bateman on behalf of the Southern Agricultural Experiment Station Directors. See H.T. 15: Agency Exh. 3. Funding for a full-time curator and for the construction of adequate facilities to house the total peanut germplasm collection was secured. The facilities were scheduled for completion in the fall of 1990. Consequently, a major part of the appellant's CRIS project, dealing with the

preservation, evaluation and enhancement of peanut germplasm, was being transferred to the Griffin, Georgia facility, and the appellant's remaining activities were not sufficient to sustain a viable project. Miller testified that the appellant's CRIS project was funded at between $155,000 and $160,000 per year, of which approximately $130,000 was required for the germplasm related work that was transferred to the Georgia facility, and that the remaining $30,000 was "not enough to cover a salary let alone any kind of operations." H.T. 25.

The appellant challenged the bona fides of the RIF. He stipulated that he had been made aware that the germplasm curator function was being transferred to

the Georgia facility in the fall of 1990[5]; however, he asserted that he was never advised that the remainder of his CRIS project, involving research into peanut breeding enhancement, would be terminated. He disputed Miller's assessment that $130,000 of his research funds were spent on the germplasm curator function. H.T. 196-98. He noted that, as the manager of the CRIS project, he determined how much of his budget would be allocated for each function of the project. While acknowledging that a great deal of his time during the "last year or so" had been spent on preparations for the transfer of the germplasm to Georgia, the appellant asserted that he nonetheless continued to

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[5] Parties may stipulate to any matter of fact and the stipulation will satisfy a party's burden of Proving the fact alleged. See 5 C.F.R. § 1201.63 (1990).

have a significant research program on peanut breeding enhancement.

Based on my review of the evidence, I find that the agency has established a prima facie case that it invoked the RIF regulations for a bona fide reason, namely a reorganization.[6] Miller's testimony that the agency had been planning for several years to consolidate its peanut germplasm system under the direction of one curator at its facilities in Griffin, Georgia was undisputed. In addition, his testimony was corroborated by the documentary evidence, as well as the appellant's stipulation that he was aware that the germplasm collection was going to be moved from Stillwater, Oklahoma to Georgia. The evidence reflects that, as a

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[6] A "reorganization" is the planned elimination, addition, or redistribution of functions or duties in an organization. See 5 C.F.R. § 351.203 (1990).

consequence of this consolidation, a significant portion of the appellant's CRIS project was transferred to the Georgia facility and a redistribution of duties resulted. I, therefore, conclude that a legitimate reorganization occurred.

The Board has held that, once it determines that a legitimate reorganization occurred, it has no authority to, and will not, review the underlying management rationale for which positions it chooses to abolish and how it organizes its work force. Holmes v. Department of the Army, 41 M.S.P.R. 612, 61415 (1989), aff'd, 914 F.2d 271 (Fed. Cir. 1990) (Table); Waksman v. Department of Commerce, 37 M.S.P.R. 640, 645 (1988), aff'd sub nom. Harris v. Department of Commerce, 878 F.2d 1447 (Fed. Cir. 1989) (Table). The appellant's assertion that his position at the Stillwater location could have been supported by the remaining

research function of his CRIS project, therefore, is insufficient to rebut the agency's prima facie case. Accordingly, I find that the agency has met its burden of showing that the RIF regulations were invoked for a bona fide reason. See, e.g., Davis v. Tennessee Valley Authority, 10 M.S.P.R. 300 (1982) (an agency is not required to show that it had to conduct a RIF, but only that it had a permissible basis for doing so).

The appellant was properly released from his competitive level.

The regulations require the agency to determine the appellant's correct retention standing, see 5 C.F.R. § 351.401 (1990), and to release the appellant from his competitive level in the inverse order of retention standing. 5 C.F.R. § 351.601 (1990). Carol Gremlich, a personnel staffing specialist, testified that the appellant was released from his

competitive level after it was determined that he was the only person in his competitive level and that, consequently, there was no one that he could displace. H.T. 48. The retention register prepared by the agency reflects that the appellant was the only person in his competitive level. See Appeal File, Vol. 11, Tab 8(4y),

The appellant stipulated that the agency's RIF notice identified his correct retention standing, i.e., position title, series, grade, competitive area, retention subgroup, RIF service computation date, last three annual performance ratings, and additional service credit for performance. See Appeal File, Vol. III, Tab 17. The appellant also confirmed that there were no other employees in his competitive area at the same grade level. See H.T. 184-85. Based on my review of the evidence, I find that the agency correctly identified the

appellant's retention standing and that there was no other employee in the appellant's competitive level; therefore, the agency properly released the appellant from his competitive level.

The appellant alleged that he was denied his proper assignment rights under the RIF regulations.

When an agency releases an employee from his competitive level, the applicable regulations provide that the employee be assigned to another position which requires no reduction or the least possible reduction in representative rate when the position is occupied by an employee in a lower subgroup. See 5 C.F.R. § 351.701(a)(1) (1990); LaPrade v. Department of Transportation, 27 M.S.P.R. 277, 281 (1985). The appellant acknowledged that the agency had offered him the position of Geneticist (Plants), GS-0440-09, to satisfy his assignment

rights. The appellant, however, asserted that he was entitled under the RIF regulations to an offer of assignment to the position of Research Geneticist (Plants), GS-0440-12, which was encumbered by Dr. David Porter.[7]

Citing FPM Supplement 351-1, Subchapter 5-8, Gremlich, the agency's personnel staffing specialist, testified that there are five criteria that an employee must meet in order to be

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[7] It is undisputed that the appellant's projects have involved the development of superior peanut germplasm and that the goal of porter's project is the development of a superior wheat germplasm.

qualified for assignment.[8] She testified

[8] FPM Supplement 351-1, Subchapter 5-8(a), lists five qualifications for an employee's assignment under 5 C.F.R. § 351 701. An employee is qualified for assignment if he:

(1) Meets the OPM [Office of Personnel Management] standards and requirements for the position, including any minimum education requirement, and any selective placement factors established by the agency;

(2) Is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position;

(3) Meets any special qualifying condition which the OPM has approved for the position;

(4) Clearly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical elements of the position of the specific position upon entry into it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee; and

(5) If assignment is to a trainee or developmental position, meet all the additional qualifications in S5-8e.

See Appeal File, Vol. II, Tab 8(4r). See also 5 C.F R §§ 351.702(a)-(e) (I990).

that, in anticipation of a RIF, a generic RIF plan and RIF analysis were developed. See H.T. 47; Appeal File, Vol. II, Tabs 8(4i), 8(4j). Based on her assessment of the appellant's basic qualifications, she originally determined that the appellant could displace Porter; however, after receiving further program documentation from management which outlined the specific technology that is required in order to perform Porter's position, it was determined that the appellant did not have assignment rights to the position. H.T. 49. Gremlich stated that the appellant met all but one of the criteria for assignment; namely, that he could not be assigned to Porter's position without

"undue interruption."[9] H.T. 51. She testified:

> Management determined that Dr. Banks [the appellant] lacked the recency of education, training, and experience which was required to perform some of the state-of-the-art technologies which was [sic] required under Dr. Porter's position.

Id.

Miller testified that the generic RIF plan and RIF analysis were forwarded to the national program staff for review. He testified that the Area Director for Stillwater, Oklahoma, Dr. Floyd P. Horn, was also given an opportunity to review

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[9] FPM Supplement 351-1, Subchapter 2-1(v), states that undue interruption means a degree of interruption that would prevent the completion of required work within the allowable time limits and quality taking into account the pressure of priorities deadlines and other demands. A work program would be unduly interrupted if an employee needed more than 90 days after the reduction in force to successfully perform the critical elements of the position. Assignments to lower priority programs or vacant positions might tolerate a longer interruption. See Appeal File, vol. II, Tab 8(4r).

the documents. Miller said that Horn subsequently advised him that he did not agree with the assessment that found the appellant qualified to displace Porter because he felt that Porter's position required an expertise in molecular genetics and, because of the appellant's lack of background in that area, it would take one and a half to two years for the appellant to fully perform in the position. H.T. 21. Miller asserted that he is generally familiar with the appellant's background and he considered Horn's assessment to be correct. He expressed his belief that Porter's project would eventually require some type of molecular genetics expertise, such as gene splicing. He acknowledged, however, that Porter's project is not under his control and that he is only generally familiar with the project. See H.T. 32-35.

Dr. Robert L. Burton testified that he is the laboratory director for the ARS plant science and water conservation research laboratory at Stillwater, Oklahoma and the research leader for the wheat and other cereal crops research unit at the plant science labs. Burton noted that the focus of the appellant's CRIS project had involved primarily two aspects: (1) the curator function for the wild peanut germplasm and (2) a research assignment directed at the development of a better quality and yield of peanut. He stated that the primary focus of Porter's position is the development of wheat germplasm that is resistant to the Russian wheat aphid and the green bug.

Burton testified that, approximately a year ago, Dr. Owen Merkel, the research agronomist who had been responsible for the laboratory's wheat breeding program, retired. Burton stated, that, prior to

Merkel's retirement, he appointed a committee to develop a position description and selection criteria for a Research Geneticist to direct the wheat breeding program. He said that he had emphasized to the committee that the national program staff wanted someone who was a conventional breeder, but who also had recent training in biotechnology. He explained that there was an emphasis on biotechnology because the conventional approach to the development of a resistance to wheat aphids which had been used in the past had not been effective; therefore, it was important that the person selected would be capable of exploring a "chemical molecular basis" for the solution of the problem. See H.T. 109. Burton related the extensive process that was employed to screen applicants for the position which ultimately resulted in Porter's selection. H. T.

Burton explained that Porter had been hired approximately a year ago and that, subsequent to his hiring, Porter had developed a CRIS project proposal with a molecular genetics approach to the wheat aphid problem. He said that Porter's CRIS project was subsequently approved by the national program staff and it had been operational for approximately three months. He described in detail the focus of Porter's CRIS project and noted that Porter has already employed biotechnology to identify certain proteins that will ultimately lead to genetic identification. See H.T. 115-17 He acknowledged that a necessary component of Porter's CRIS Project was the development of germplasm through conventional techniques, such as those that had been employed by the appellant in his peanut germplasm research; however, he noted that this particular function is performed primarily

by Porter's support staff so that he was free to concentrate on the molecular genetics approach to the project. See H.T. 139.

Burton testified that he was familiar with the appellant's work with the agency and that he had recently reviewed the appellant's qualifications to determine whether he could perform porter's position without causing undue interruption. Burton testified that the appellant lacks the necessary knowledge of biotechnology to effectively perform Porter's position. He reviewed the factors that he had considered and indicated that he had made specific inquiries about the expertise the appellant had claimed as qualifying him for Porter's position. See H.T. 131. Specifically, Burton said he investigated the appellant's claim of experience with restriction fragment-linked polymorphisms (RFLP) and learned that, although the

appellant had provided financial support for a graduate student whose project involved RFLPs, the appellant did not have any hands-on experience and that the technical guidance for the project was provided by a professor at Oklahoma State University. See H.T. 131-136.

Burton acknowledged the appellant's claim that he had kept up with the latest technology through his survey of the literature and periodic seminars. Burton repeatedy emphaslzed, however, that the type of education and experience necessary to Perform Porter's position without undue interruption required extensive and concentrated study which the appellant does not have. See H.T. 136-37. Burton asserted that there is an urgency to Porter's project. While acknowledging that substantial results are not anticipated for several years, he explained that the problem of the Russian

wheat aphid in this country is growing and has already accounted for $250,000,000 in crop damage over the past four years. He testified that, if the appellant were allowed to displace Porter, the present CRIS project would have to be converted to a conventional-type of research project and that would require them to have the new project reviewed and approved by the national program staff.

Dr, Jerome P. Miksche testified that he is the national program leader with responsibilities for plant physiology/ biotechnology/basic plant biology, and he also serves as the director of the USDA Plant Genome Research Program. H.T. 64. He testified that he had reviewed the position descriptions for the appellant and Porter approximately two weeks prior to the hearing, but had not done so in connection with the RIF. H.T. 87.

Miksche testified that, based on his review of Porter's position description, he had determined that the position requires the application of "new molecular biology techniques to locate the genes of interest." H.T. 67. He described the steps that Porter will have to perform to meet his goals and asserted that the duties and responsibilities of the position require the use of state-of-the-art technology. He also gave specific examples of that state-of-the-art technology, specifically referencing the ballistics gun technique, electrophoresis and DNA/RNA hybridization technologies. H.T. 68-70.

Miksche listed the type of training necessary to qualify person to perform the functions of Porter's position Specifically, he indicated that a person would require at least two hard-core semesters of molecular biology, up-to-date

training in plant biochemistry and biochemistry in general, two semesters of developmental genetics, and physical chemistry. Miksche said that this type of training would require at least two years of "intense academic course work at the advanced graduate level." H.T. 70-71. He emphasized that the recency of training was also very important and explained that this is a rapidly developing area of science and that a number of the courses were not in existence two or three years ago.

Miksche described the appellant as a "classical geneticist" and asserted that the "classical geneticist" looks for a genetic trait in a plant or animal system that he desires and, once the selection is made, he develops a variety of the species which offers the desired genetic resistance through the implementation of cross-pollination. H.T. 72. He opined

that this procedure would require "many growing seasons" in the case of wheat. In comparing the classical breeding approach with the molecular breeding approach, Miksche stated:

> The main difference would ... be the use of precision in [molecular genetics] technology and getting the gene system you want deliberately and immediately compared to trial-and-error methods of classical breeding.

H.T. 74.

Horn confirmed that he had reviewed the RIF analysis prepared by the personne staffing specialist and that he had not agreed with the original determination that the appellant could take over Porter's project without there being a substantial delay. H.T. 176. He stated that there was no way that the appellant could become productive within 90 days. Horn stated that the wheat project is an extremely high priority with the agency and that there can be no delay in taking action. He noted that the training and

skills required for Porter's position were not available when the appellant was in school and opined that it would take the appellant in excess of two years to develop those skills. H.T. 177.

As support for their claim that the incumbent of Porter's position requires knowledge and experience in molecular genetics and other biotechnologies, the agency's witnesses cited Porter's position description. see Appeal File, Vol. II, Tab 8(4q). They noted that the position description states that the methodology to be used "includes both conventional and novel breeding techniques, including irradiation, embryo rescue, and anther and somatic tissue culture." Id. Also, the knowledge required for the position specifically references "a familiarity with basic concepts of molecular genetics" and "a practical knowledge of modern technology." Id.

The appellant challenged the agency's contention that Porter's position requires an extensive knowledge of modern biotechnology and molecular genetics. He cited the position description developed for Porter's position, asserting that he does have a familiarity with basic concepts of molecular genetics and a practical knowledge of modern technology. The appellant asserted that there is a "striking similarity" between his position description and Porter's. Also, he testified that he has kept up with the developments in biotechnology through his review of the literature in this area and his participation in various scientific seminars and meetings. H.T. 191.

Referencing the vacancy announcement for Porter's position and the position description, the appellant asserted that there are no selection criteria for the position which he does not meet.

Moreover, he testified that he was a member of the committee that prepared Porter's position description and it was not the intent of the committee to restrict the selection to a molecular geneticist. H.T. 202. He testified that the committee had written the position description in broad language and that the committee had made a specific effort to craft the position so that Carol Baker, a GS-9 Geneticist, who was then working for Merkel, would not be automatically excluded from consideration. H.T. 203.

The appellant disputed the agency's claim that he cannot perform Porter's position without causing undue interruption. He noted that Porter had only been operating under his CRIS project for approximately one month at the time of the appellant's retirement and that he did not foresee any difficulty in immediately taking steps to develop wheat germplasm.

He acknowledged that he cannot move into the laboratory and do what Porter is presently doing; however, he noted that there are a number of methodologies available and that the molecular genetic approach is just one of them. H.T. 192-93. When asked how his approach would differ from Porter's, the appellant testified:

> I certainly wouldn't rely specifically on the molecular approach. The approach is still in its infancy. It involves -- and it is a good science, but not like others. It is evolving over time.
>
> One doesn't have to know how a gene functions or really where it is in order to cross plants and select for resistance. And so I would very quickly try to get the germplasm moving in that direction.

H.T. 194.

The appellant described his educational background, noting that his undergraduate degrees were in the areas of agronomy and botany, which included the option of genetics' H.T. 184. He

testified he had received his Ph.D from the University of Georgia in 1966 in the field of plant science and that he subsequently secured teaching/research experience in Texas prior to moving to Stillwater in 1966, where he worked on peanut breeding and genetics until his retirement. On cross examination, the appellant acknowledged that the last course work he had completed since receiving his Ph.D. was a course in cytogenetics in 1963; that he had not had any courses in biochemistry, molecular biology, developmental genetics, molecular genetics, or any other formal courses in the new biotechnological areas. He also acknowledged that he had not worked in tissue culture and embryo rescue since 1970 and that he has no experience in the new technology associated with wheat breeding. See H.T. 212-15.

I have closely reviewed the position descriptions of the appellant and Porter and the vacancy announcement issued in May 1989 for Porter's position. I have also reviewed the summary of the appellant's experience which was submitted with his Petition for appeal. Appeal File, Vol. I, Tab 2, App. M. Although the record confirms Gremlich's assessment that the appellant meets the selective criteria for porter's position and, therefore, meets the requirements for assignment under 5 C.F.R. § 351.702(a)(1) (1990), I nonetheless find that the appellant is not qualified to displace Porter because it would cause undue interruption. Unlike a vacant position where the satisfaction of the minimum requirements for the position would probably qualify the employee for assignment, see, e.g., Mazzola v. Department of Labor, 25 M.S.P.R. 682, 686 (1985), the contested position in this

case has been encumbered for a year. Moreover, the record reflects that the incumbent of the position has made significant progress in development of his CRIS Project.

Although Porter's CRIS project may have been approved by the national program staff only one month prior to the appellant's retirement, the evidence reflects that its development and ultimate approval took approximately nine months. See H.T. 99-100. The undisputed testimony of Burton reveals that, if the appellant were allowed to displace Porter, it would be necessary for him to submit a new project proposal for approval by the national program staff which would further delay the development of the wheat germplasm, as well as diminish the value of the research already accomplished by Porter. The appellant admitted that he could not perform the research currently

being conducted by Porter and that he would instead rely on the techniques he has used in the past in the development of peanut germplasm. It was acknowledged that the type of research which the appellant proposes continues to have a practical application. Nevertheless, it is not the research that was clearly envisioned by the position description established for Porter's position which calls for the integration of modern biotechnology into the conventional breeding approach.

Based on my review of the evidence, I find that the appellant does not have the recency of experience in the area of molecular genetics or modern biotechnology that is necessary to perform in the position as it was established without undue interruption, I, therefore, conclude that he is not qualified for reassignment to the Research Geneticist (Plants), GS-

0440-09, position presenty encumbered by Porter.

I further find, based on my review of the evidence, that the assignment offer which would require the least reduction in representative rate to which the appellant was entitled under the RIF regulations was the Geneticist (Plants), GS-0440-09, position. Because the agency offered this position to the appellant and he declined it, I find that the agency has satisfied the appellant's assignment rights and has established that it properly applied the RIF regulations in this case. See LaPrade v. Department of Transportation at 283.

**DECISION**

The agency's action is AFFIRMED.

FOR THE BOARD:

/S/_____
Sharon Fonsworth Jackson
Administrative Judge